87-363

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN R. O'DONNELL, Petitioner,

v.

LOCAL 165 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED

(1) Whether a litigant has a right under the Due Process clause of the Fourteenth Amendment to Constitution of the United States to cross-examine the only witness brought against him at a civil trial.

(2) Whether Section 8(b) (1) (A) of the National Labor Relations Act allows a labor union to fine a member who has tendered a resignation invalid under an unwritten union policy.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Steven R. O'Donnell and the respondent Local 165, International Brotherhood of Electrical Workers, AFL-CIO.

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STEVEN R. O'DONNELL, Petitioner,

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LOCAL 165 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

The petitioner Steven R. O'Donnell respectfully prays that a writ of Certiorari issue to review the Order Disposing of Appeal of the Appellate Court of Illinois, First Judicial District, entered in the above cause on January 30, 1987.

OPINIONS BELOW

The order Disposing of Appeal for the Appellate Court of Illinois, First Judicial District, (No. 86-0191), is unreported and is reprinted in the appendix hereto, p. 2a, infra.

JURISDICTION

The respondent brought this suit in the Circuit Court of Cook County Illinois. Trial was held on December 19, 1985, and the complaint was dismissed with prejudice that same day. On respondent's appeal, the Appellate Court of Illinois, First Judicial District, on January 30, 1987, reversed the order of the trial court and issued a mandate directing that judgment be entered in favor of the respondent. A petition for rehearing was denied on March 13, 1987, and leave to appeal to the Supreme Court of Illinois was denied on June 4, 1987.

The jurisdiction of the Court to

review the judgment of the Appellate Court of Illinois, First Judicial District, is invoked under 28 U.S.C. Section 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves sections 7, 8(a)(3), and 8(b)(1)(A) of the National Labor Relations Act. 29 U.S.C. 157, 158(a)(3), 158(b)(1)(A). Also involved is the due process clause of the Fourteenth Amendment to Constitution of the United States. U.S. CONST. amend, XIV, Section 1. These are reproduced in the appendix beginning on page 23a.

STATEMENT OF THE CASE

This cause emanates from a labor dispute between Local 165, IBEW and the Illinois Bell Telephone Company in August of 1983. On Sunday, August 7, 1983, Local 165 went on strike against Illinois Bell not as a result of a vote of its members but pursuant to the directive of the President of the IBEW. [For a more detailed description of the events surrounding the strike and a graphic example of the cool reception the strikers received in the Circuit Court of Cook County, see Local 165, Intern. Broth. v. Bradley, 149 Ill. App.3d 193, 499 N.E.2d 577 (1986).] At that time defendant was a member of Local 165 and was employed by Illinois Bell. On Monday, August 8, 1983, picket lines were established by the members of Local 165. The strike ended on August 23, 1983.

Mr. O'Donnell crossed the picket line

on August 8, 1983, and reported for work. However, shortly before beginning work, Mr. O'Donnell resigned from the union. The union disputes that the resignation was legally effective.

Disciplinary charges were filed against Mr. O'Donnell by Local 165 for working during the strike. A hearing was held on the charges on October 18, 1983, before the Local 165 Executive Board. Mr. O'Donnell was not present. John Motal, the Local 165 union steward, appeared at the hearing and testified against the defendant. The Local 165 Executive Board fined defendant what they believed to be his gross earnings during the strike, plus a $25.00 administrative fee.

After attempts to collect the fine, Local 165 filed its second complaint to enforce the fine assessed against Mr. O'Donnell on October 4, 1985. He was properly served and filed a pro-se

appearance without answer as allowed by Illinois Supreme Court Rule 286. This attorney filed his substitute appearance at trial on December 19, 1985. There was a stipulation of facts and the parties proceeded to trial on the sole issue of whether Mr. O'Donnell effectively resigned from the union on August 8, 1983.

At trial, Mr. O'Donnell took the stand first. He testified that he went to the fence at the jobsite and called out to union steward John Motal. He further testified that Mr. Ryan, the former union steward, answered the call. Mr. O'Donnell testified that he handed his union card to Mr. Ryan and told him "I'm out of the union." Mr. O'Donnell went on to state that Mr. Ryan then crossed the street and spoke with John Motal, the present union steward.

The next witness called was Mr. Jim Bennett, a union member who was present on

the jobsite on August 8, 1983. Mr. Bennett testified that he observed a conversation between Mr. O'Donnell and Mr. Ryan on that morning. He then testified that he saw Mr. Ryan accept Mr. O'Donnell's union card. Finally, he testified that he saw Mr. Ryan then return across the street and confer with union steward Motal. The union did not cross-examine Mr. Bennett on this testimony.

At the close of Mr. O'Donnell's case, the union proceeded to call Mr. John Cheeseman, Jr., a member of the Local 165 Executive Board, to the stand. Mr. Cheeseman testified that he was a member of the Executive Board during the August, 1983, strike. He also testified that no one at the business office of Local 165 ever received notice that Mr. O'Donnell had attempted to resign from Local 165 IBEW. Mr. Cheeseman went on to testify

that at the time of the strike, Local 165 had approximately 5,000 members who were employed by the telephone companies at 75 different locations.

At that time, Judge Elden interrupted the direct examination of Mr. Cheeseman and asked plaintiff's attorney to explain the purpose for which the above testimony was being presented.

During a lengthy offer of proof by counsel, Judge Elden inquired whether there was an official, written procedure within Local 165 for resigning from membership. Plaintiff's attorney replied that there was no written procedure. At the conclusion of the offer of proof Judge Elden held that Mr. O'Donnell had effectively resigned from the union and entered an order dismissing the union's complaint with prejudice.

The petitioner, in a pre-trial conference with opposing counsel present,

advised the trial court of this Court's decision in Pattern Makers' League v. NLRB, 105 S. Ct. 3064 (1985), interpreting Section 8(b) (1) (A) of the National Labor Reltions Act to prevent a union from restricting a member's right to resign. However, because the trial court cut the trial short by ruling in petitioner's favor shortly after the respondent's case in chief began, petitioner never had the chance to argue the case as controlling in this litigation. Since the ruling of the court below was not based on specific findings, Illinois law allows a winning litigant to argue any ground in support of the judgment below that appears in the record. Petitioner argued in his briefs on appeal, inter alia, that Section 8(b) (1) (A) prevented the union from prohibiting Mr. O'Donnell's resignation on the basis of an unwritten policy contained in neither its bylaws nor its

constitution.

The denial of Mr. O'Donnell's right to cross-examine the only witness brought against him at trial did not arise until the decision of the Appellate Court was issued. Petitioner immediately raised the issue in his petition for rehearing and argued the issue in his petition for leave to appeal before the Supreme Court of Illinois. Petitioner has no further avenue of review under Illinois law.

REASONS FOR GRANTING THE WRIT

I.

THE REVERSAL OF THE DECISION OF THE TRIAL COURT WITHOUT ALLOWING MR. O'DONNELL AN OPPORTUNITY TO CROSS-EXAMINE THE ONLY WITNESS AGAINST HIM AT TRIAL IS A VIOLATION OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The right to cross-examine adverse witnesses has long been an established principle of American law. 16A Am Jur 2d Constitutional Law Section 849; 81 Am Jur 2d Witnesses Section 464. As Professor Wigmore stated:

> The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience .... If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

> 5 Wigmore, Evidence, sec.1367 (Chadbourn rev. 1974).

Professor McCormick has written this about the opportunity to cross-examine adverse witnesses:

> For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege.
>
> McCormick on Evidence, sec.19 (2nd Ed. 1972).

This Court has long held that the opportunity to cross-examine adverse witnesses is an aspect of procedural due process. Goldberg v. Kelly, 397 U.S. 254 (1970); Jenkins v. McKeithen, 395 U.S. 411, reh den 396 U.S. 869 (1969); Willner v. Committee on Character & Kitners, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959); Alford v. United States, 282 U.S. 687 (1931); Gilmer v. Higley, 110 U.S. 47 (1883); The Ottawa, 70 U.S. 268

(1865).

The law in Illinois is in agreement with these authorities. The Appellate Court of Illinois, Third District, has stated:

> It is a fundamental concept of due process which is guaranteed by our state and federal constitutions that the right of cross-examination should not be arbitrarily denied by any court.
>
> City of Joliet v. Jackson, 4 Ill. App. 3d 826, 827, 281 N.E.2d 442, 443 (1972). People v. Del Prete, 364 Ill. 376, 4 N.E.2d 484 (1936); Golden Egg Club, Inc. v. Illinois Liquor Control Com'n, 124 Ill. App.2d 241, 260 N.E.2d 329 (1970).

Other states are also in accord with this fundamental principle of due process. McLaughlin v. Superior Ct. for San Mateo Cty., 140 Cal. App.3d 473, 481 (1983); Armijo v. Armijo, 98 N.M. 518, 519 (1982); Kaelin v. City of Louisville, 643 S.W.2d 590 (1982); Muraskin v. Muraskin, 336 N.W.2d 332, n.2, 335 (N.D. 1983); Smith v. Atty. Gen. of Maryland, 415 A2d 651 (App.

1980).

At trial, Mr. O'Donnell had neither the opportunity nor the need to cross-examine union boss Cheeseman. The trial judge ruled in his favor shortly into the proceedings. The Appellate Court completely ignored this lack of opportunity to cross-examine when it reversed the decision.

The Court below stated:

> There is nothing in the record to support the inference that Ryan notified John Motal, the union steward, or that Motal advised his superiors of defendant's resignation.
>
> As a matter of Illinois evidentiary law, a fact cannot be inferred from the evidence when the existence of another fact inconsistent with the first fact inferred can be inferred with equal certainty. (Prebrey v. Gillette (1982), 105 Ill. App. 3d 1082; 435 N.E.2d 513.) John Cheeseman, a member of the plaintiff's union, testified that no one at the union office or union officials received notice of defendant's attempt to resign and that defendant was listed on the union membership rolls as a "member, not in good standing" at the time of the trial. This

> testimony is unrebutted. From this testimony and defendant's admission that he gave no other notice of his resignation than tendering his card to Ryan and saying he quit, it can be inferred that Ryan did not notify Motal of defendant's statement and the relinquishment of his union card.
>
> Opinion at pages 3 and 4.

The first glaring error of the Appellate Court opinion is the statement that Cheeseman testified "that defendant was listed on the union membership rolls as a 'member, not in good standing' at the time of the trial." The union, through counsel, made an offer of proof that Mr. Cheeseman would testify to that effect, but such testimony was excluded by the trial judge. An offer of proof is an attempt by a proponent to preserve the question of whether the judge's ruling on the exclusion of evidence was proper and whether the exclusion requires a new trial. McCormick on Evidence, sec. 51 (2nd Ed. 1972). It is not evidence, it is

not subject to cross-examination, and it is a violation of due process of law to decide the merits of a case on matters not admitted into evidence.

Secondly, Cheeseman's testimony that was admitted into evidence was never subjected to the rigorous test of cross-examination. Mr. O'Donnell never had an opportunity to either elicit favorable testimony to support his defense or descredit the testimony of union boss Cheeseman by demonstrating his bias and prejudice against Mr. O'Donnell for exercising his federally protected right to refrain from concerted activity. Mr. O'Donnell was also deprived of the opportunity to have the trier of fact weigh the demeanor and credibility of Cheeseman under the stress of cross-examination. Nor did Mr. O'Donnell have the opportunity to rebut the new matter raised by the union's only witness.

This deprivation of a fundamental right occurs not from the action of the trial court, but from the action of the Appellate Court of Illinois, First Judicial District. Since the trial court ruled in his favor shortly after the union began its case, it would have been a waste of judicial resources to insist on cross-examining the union's only witness. However, the reversal of the judgment below by the Appellate Court without allowing Mr. O'Donnell the opportunity to both cross-examine that witness and rebut new matter raised in that testimony violates procedural due process as guaranteed by the Fourteenth Amendment. Jenkins, supra; Goldberg, supra; Willner, supra; Greene, supra; Alford, supra; Gilmore, supra; The Ottawa, supra.

The decision of the Appellate Court of Illinois First Judicial District is in direct conflict with the Constitution of

the United States and the many decisions of this Court which have interpreted procedural due process to include the right to confront and cross-examine adverse witnesses at a civil trial. The due process right to cross-examine adverse witnesses is a substantial federal right. This substantial federal question was properly raised below in the petition for rehearing in the Appellate Court and in the petition for leave to appeal to the Supreme Court of Illinois. Since the petitioner was never given the opportunity to cross-examine the union's only witness, the short testimony given is not worthy of use in a court of law and any inferences drawn from it by the Appellate Court cannot stand as an adequate and independent ground of state law.

The law is clear cut on this issue. There is no need to schedule full briefs and oral argument on this point of law.

The case is a proper one for disposition under Rule 23. This glaring deprivation of a fundamental and substantial federal right cries out for this Court to summarily reverse the decision below.

II.

THE DECISION OF THE APPELLATE COURT ESTABLISHES A RESTRICTION ON MR. O'DONNELL'S FEDERALLY PROTECTED RIGHT TO RESIGN FROM THE UNION, AND AS SUCH, IS IN CONFLICT WITH THE COURT'S DECISION IN PATTERN MAKERS' LEAGUE V. NLRB, 105 S. CT. 3064 (1985).

The Appellate Court, as one of its grounds in support of reversal, stated that a resignation from the union, in order to be effective, must be written, communicated to a union officer, or delivered to the union's business office. This holding places a restriction on a union member's federally protected right to resign under the National Labor Relations Act.

Since the National Labor Relations Board's (NLRB) conclusion that all restrictions on the right to resign are inconsistent with the policy of voluntary unionism implicit in Section 8(a)(3) of National Labor Relations Act (NLRA) has

been affirmed by this Court, the Appellate Court's holding conflicts with that decision and cannot stand. Pattern Makers' League v. NLRB, supra; Southwestern Legal Foundation, Labor Law Developments sec. 1.02(1) (Matthew Bender, 1986).

Section 8(b)(1)(A) of the NLRA states a union may not restrain or coerce an employee in the exercise of his rights guaranteed by Section 7, one of which is the right to refrain from concerted activity. 29 USC Sections 157 - 158(b)(1)(A); Pattern Makers' League v. NLRB, supra. In Pattern Makers' v. NLRB, the NLRB concluded that a union violates Section 8(b)(1)(A) if it prohibits resignations during a strike and attempts to fine a member who has gone back to work during a strike after attempting to resign. In addition, the NLRB also concluded that all union restrictions on

the right to resign are inconsistent with the policy of voluntary unionism implicit in Section 8(a)(3). 29 USC Section 158(a)(3). The United States Supreme Court affirmed the NLRB's interpretations of these federal statutes. Pattern Makers' League v. NLRB, supra.

The rationale of the Pattern Makers' case is readily apparent. Judicial enforcement of a fine which approximates the entire wages earned by an employee during a strike is the most effective form of coercing him to act in concert with the union members who support the strike. Yet such a fine may be imposed on a union member in spite of the clear language of Section 8(b)(1)(A) of the NLRA. NLRB v. Allis-Chalmers, 388 U.S. 175, 65 L.R.R.M. 2449 (1967). The only way to square the decision in Allis-Chalmers is to recognize in the union member an unrestricted right to voluntarily leave the union. See The

Southwestern Legal Foundation, Labor Law Departments, supra, pages 1-9, 1-10. Thus, if the worker voluntarily stays with the union, the fine is not an attempt to force the worker into concerted activity. However, if the worker is prevented from voluntarily leaving the union, judicial enforcement of a fine against him becomes the coercion prohibited by Section 8(b)(1)(A). 29 USC 158(b)(1)(A). The decision of the Appellate Court destroys this harmony.

In Pattern Makers', the prohibition against resignations was a written provision of the union's constitution. In the instant case, the union admitted, upon questioning of the trial judge, that there was no official, written procedure within the union for resigning from membership. Nor is there a provision in the union's constitution which puts a member on notice that resignations tendered to a steward

will not be accepted. "[I]n the absence of any rule or bylaw to the contrary, a resignation becomes effective immediately, and acceptance by the association or its designated officers is not required." 6 Am Jur 2d Associations and Clubs section 26. According to the decision of the Appellate Court, one need only keep one's restrictions on the right to resign in unwritten policy form in order to defeat a union member's federally protected right to refrain from concerted activity by resigning from his union. Such an interpretation of the law is an evisceration of the Pattern Makers' decision.

Moreover, think of the practical restrictions the court has imposed here. Before a worker could begin work on that Monday of the strike, he would have had to either find a union officer (the union presented no testimony that a union

officer was at the jobsite) or deliver a written resignation to the business office. If the union secretes its officers and closes its business offices during a strike, they could effectively prevent a resignation and coerce the worker to stay off the job for fear of a judicially enforced fine. Yet the union would be allowed to have stewards on each jobsite who, the union claims, can be trusted to accurately testify against a worker at a proceeding to confiscate his wages but be considered unreliable when it comes to relaying a resignation to the union.

Furthermore, the unwritten union policy is a restriction on a union member's right to resign contrary to the common law. It is a common occurrence in this country for an employee to walk off the job with the simple oral statement "I quit." Most often, the statement is heard

by other employees or a supervisor, usually none of whom are officers of the corporation. Yet, few would contend that the employee did not effectively resign from the job. The decision of the Appellate Court would invalidate such a resignation.

Illinois has long recognized that oral resignations are valid. Dvorak v. Bohemian First Centeral Union, 170 Ill. App. 624 (1912). By definition, a resignation is the formal renouncement or relinquishing of an office. Bauer v. Saper, 133 Ill. App. 3d 760, 272 N.E.2d 703 (1971) citing Black's Law Dictionary, 4th Ed. Black's Law Dictionary, 5th Ed., goes on further to state that it "must be made with intention of relinquishing the office accompanied by an act of relinquishment." There are no requirements that a resignation be in writing and communicated to an officer of

an organization in person by the one attempting to resign. The imposition of those requirements on Mr. O'Donnell constitutes a restriction on his ability to resign from union membership.

Mr. O'Donnell gave his union card to Ryan, the former union steward, and told him he was out of the union. The statement to Ryan indicated his intent to resign and his act of handing over his union membership card, his only badge of membership, constituted an act of relinquishment. In other words, Mr. O'Donnell formally renounced and relinquished his membership by tendering his card to Ryan to give to Motal. When Ryan crossed the street and conveyed this to Motal, the union steward on the picket line, that was all that was necessary to make the resignation effective.

Moreover, the NLRB has decided that tender of a membership card to a union is

an effective resignation. In Communication Workers Local 6135, 188 NLRB 144, 76 LRRM 1635 (1971), a telephone workers union tried to impose fines on members who had returned to work after tendering their membership cards to the union and an attempt to stop paying dues.

The NLRB stated:

> We agree with the Trial Examiner that [the employees] ... by revoking their dues check-off authorizations and by returning their membership cards to the Union they provided clear notice of their intent to resign, although there was no provision in the Respondent's bylaws or the International's constitution for resignation from the union. However, we do not rely solely on the check-off revocations which were addressed not to the Union, but to the Company. We find that the time of the Union's receipt of the membership cards ... constituted the effective time of their resignations.
>
> Communication Workers, Local 6135, 188 NLRB at 144, 76 LRRM at 1636.

The NLRB did not hold that the resignation either be in writing or

communicated to an officer. In fact, the board did not even require that the employees prove the union received the union cards. The board presumed that the union received the membership cards immediately after mailing.

Here, there was direct evidence that union steward Motal received the resignation. Mr. O'Donnell and Mr. Bennett testified that Ryan immediately crossed the street and conferred with Motal. The union did not cross-examine either witness on this point. Given the trouble that some unions have had in receiving resignations by mail, see United Electrical, Radio & Machine Workers of America, 187 NLRB 46, 76 LRRM 1038, transmittal of the resignation by the former union steward to the present union steward is a more positive way of seeing that the union receives notice of the resignation.

The decision of the Appellate Court restricts the right of a union member to resign from the union. Since all restrictions on the right of a union member to resign have been declared invalid and unenforceable in the Pattern Makers' decision, the opinion below is in direct conflict with a decision of the United States Supreme Court. Such a conflict demonstrates the highest need for exercise of this honorable Court's discretion to issue the writ of certiorari.

Because trial was interrupted shortly after the respondent's case in chief and a decision entered in his favor, petitioner was unable to argue this substantial federal right at trial. However, petitioner was allowed to and did argue this ground in support of the judgment below on appeal and in his petition for leave to appeal before the Supreme Court

of Illinois. And for the reasons stated under petitioner's due process argument, there is no adequate and independent state ground upon which the judgment can rest. This case is a proper one for exercise of the Court's certiorari jurisdiction.

CONCLUSION

For the above reasons, the petitioner, Steven R. O'Donnell, respectfully requests that the Court issue the writ of certiorari and reverse the decision of the Appellate Court of Illinois, First Judicial District.

Respectfully submitted,

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August 31, 1987

APPENDIX

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Plaintiff-Appellant,	)	86-0191
vs.	)	
STEVEN R. O'DONNELL, Defendant-Appellee	)	

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Plaintiff, Local 165 of the International Brotherhood of Electrical Workers (hereafter the union) appeals from a judgment of the circuit court dismissing its action which sought to enforce a fine against one of its members, the defendant, Steven O'Donnell, for working during the strike. After a bench trial, the court entered a finding that defendant had effectively resigned from the union at the commencement of the strike and dismissed the complaint with prejudice. The sole issue presented for our review is whether a union member may

tender his card to another member to effectuate resignation from the union.

The defendant is an Illinois Bell Telephone Company (hereafter Bell) employee and was a member of the union prior to August 7, 1983. In August 1983, the union and Bell were engaged in a labor dispute, and on August 7, 1983, pursuant to the directive of the union president, went on strike against Bell. Defendant crossed the picket line established by the union and worked for Bell throughout the strike. Thereafter, disciplinary charges were instituted against defendant pursuant to article 27, section 1, subsection 17 of the union constitution which provides:

> "§ 1. Any member may be penalized for committing any one or more of the following offenses.
>
> * * *
>
> (17) Working for any individual or company declared in difficulty with a [the union] in accordance with this constitution."

On October 10, 1983, the union executive

board found the defendant guilty of working during a strike and fined him $2,025. Defendant failed to pay the fine and the union instituted an action to collect the alleged debt.

At trial the defendant testified that on August 8, 1983, he crossed the union picket line, entered the Bell workplace and called across the street to the union steward, John Motal. Jack Ryan, a former union steward, answered the call, crossed the street and spoke with the defendant. Defendant testified that he handed his union card to Ryan and stated, "I'm out of the Union." Defendant and Jim Bennet, another union member, who crossed the picket line, testified that they observed Ryan cross the street and speak with Motal. Defendant admitted that he had not taken any other action to notify the union of his resignation.

John Cheeseman, a member of the

union's executive board, testified that the defendant had not sent notice of his resignation to the union's business office. After this testimony, the trial judge interrupted the plaintiff's attorney and requested that he explain the relevancy of the witness' testimony. Plaintiff's attorney revealed that it was the union's policy that a resignation is only effective when received in writing by th union at their business office. Thereafter, the trial court found that the defendant had effectively resigned from the union and dismissed plaintiff's complaint with prejudice.

The union contends on appeal that defendant's tender of his union card to another union member does not constitute effective notice of resignation from union membership and thus he was a member of the union and violated the union's constitution and by-laws [sic] by working

for Bell during the course of the strike. The union argues that defendant's attempted resignation was ineffective because it was not written, communicated to a union officer, or delivered to the union's business office. We agree.

The burden of proving notice is upon the person charging it. (Reed v. Eastin (1942), 379 Ill. 586, 41 N.E.2d 765; Brown Bag Co. v. Bituminous Cas. Corp. (1986), 117 Ill. App. 2d 287.) In the instant case the record reveals only that defendant advised the ex-steward Jack Ryan that "I am out of the union" and handed his union card to Ryan. There is nothing in the record to support the inference that Ryan notified John Motal, the union steward or that Motal advised his superiors of defendant's resignation.

As a matter of Illinois evidentiary law, a fact cannot be inferred from the evidence when the existence of another

fact inconsistent with the first fact inferred can be inferred with equal certainty. (Prebrey v. Gillette (1982), 105 Ill. App. 3d 1082; 435 N.E. 2d 513.) John Cheeseman, a member of the plaintiff's union, testified that no one at the union office or union officials received notice of defendant's attempt to resign and that defendant was listed on the union membership rolls as a "member, not in good standing" at the time of the trial. This testimony is unrebutted. From this testimony and defendant's admission that he gave no other notice of his resignation than tendering his card to Ryan and saying he quit, it can be inferred that Ryan did not notify Motal of defendant's statement and the relinquishment of his union card.

Further, this court's decision in Mid American Bargaining Association v. Modern Builders (1981), 101 Ill. App. 3d 83, ____

N.E. 2d ____ supports our present determination. In Mid American, this court reversed the trial court's decision and upheld an arbitrator's award of a fine against a carpenter's employer for failing to "lock out" his employees as required by an employer's association rules when the carpenters union called a strike on other members of the assocation. The carpenter employer resigned from the association by letter when he was advised to lock out employees. Therefore if an employer's association can fine a resigned member who has refused to "lock out" his union employees during a strike on other members, it is difficult to see how an employees' association (a trade union) cannot impose a fine on one of its members for violation of its rules who, at best, informally attempted to quit the union after a strike was called.

Accordingly, the judgment of the

circuit court is reversed. MURRAY, J.

SULLIVAN, P.J. and PINCHAM, J., concur.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Plaintiff-Appellant,	)	86-0191
vs.	)	
STEVEN R. O'DONNELL, Defendant-Appellee	)	

ORDER

Defendant-Appellee's Petition for Rehearing is denied. March 13, 1987.

BEST AVAILABLE COPY

June 4, 1987

Illinois Supreme Court

No. 65093 - Local 165 v. O'Donnell

The Supreme Court today DENIED the petition to appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 26, 1987.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Plaintiff-Appellant,	)	86-0191
vs.	)	
STEVEN R. O'DONNELL, Defendant-Appellee	)	

AGREED REPORT OF PROCEEDING

The parties in the above action, by their attorneys, hereby submit the following Agreed Report of Proceedings of the trial in the above matter which took place on December 19, 1985 before the Honorable Morton C. Eldon.

STIPULATION BEFORE TRIAL:

Prior to trial defendant stipulated to all the facts alleged in plaintiff's complaint and agreed to proceed to trial on the sole issue of whether defendant had effectively resigned on August 8, 1983, from Local 165.

DIRECT EXAMINATION OF STEVEN R. O'DONNELL:

The testimony of Steven R. O'Donnell

on direct examination is as follows:

On August 8, 1983, the first day of the strike between Illinois Bell Telephone Co. and Local 165, IBEW, Mr. O'Donnell crossed the picket line and reported for work at Illinois Bell, 8901 S. State Street, Chicago, Illinois.

Shortly after entering the workplace, Mr. O'Donnell went to the fence and called to Mr. John Motal. Mr. Jack Ryan then crossed the street to speak to Mr. O'Donnell. Mr. Jack Ryan was a member of Local 165 and was present on the picket line established by Local 165 at Mr. O'Donnell's place of work. Mr. Ryan was a former union steward for Local 165, but on August 8, 1983, Mr. Ryan held no official position with Local 165. At the fence, Mr. O'Donnell relinquished his union card to Mr. Ryan and stated, "I'm out of the union."

Mr. O'Donnell then testified that he

later saw Mr. Ryan cross the street and speak to a Mr. John Motal, who was a Local 165 union steward at Mr. O'Donnell's place of employment.

CROSS EXAMINATION OF STEVEN R. O'DONNELL:

Mr. O'Donnell admitted that other than tendering his union card to Mr. Ryan, he gave no other notice to Local 165 of his resignation from the union.

DIRECT EXAMINATION OF JIM BENNETT:

Mr. Bennet was a member of Local 165 during the August 1983 strike. On the first day of the strike, Mr. Bennett crossed the picket line and reported for work at 8901 S. State Street, Chicago, Illinois, which was his place of work at Illinois Bell.

Later that morning, Mr. Bennett observed Mr. O'Donnell approach Mr. Jack Ryan at the fence surrounding the Illinois Bell workplace. At the fence, Mr. Bennett observed Mr. O'Donnell give his union card

to Mr. Ryan.

Later, Mr. Bennett observed Mr. Ryan cross the street and speak to Mr. John Motal, a union steward at 8901 S. State Street.

DIRECT EXAMINATION OF JOHN CHEESEMAN, JR.:

Mr. Cheeseman testified that he was a member of the Local 165 IBEW Executive Board and that he held that position during the August 1983 strike with Illinois Bell. Mr. Cheeseman testified that no one at the business office of Local 165 ever received any notice that Mr. O'Donnell had attempted to resign from Local 165 IBEW.

Mr. Cheeseman testified that at the time of the August 1983 strike, Local 165 had approximately 5,000 members. These members were employed by Illinois Bell Telephone Company and American Telephone and Telegraph Company at over seventy-five different locations throughout Cook

County.

At this time Judge Eldon interrupted the direct examination of Mr. Cheeseman and asked plaintiff's attorney to explain the purpose for which the above testimony was being presented. Plaintiff's attorney replied that the purpose of this testimony and other testimony and exhibits to follow was to show that the tendering of a union card to another member of Local 165 was ineffective notice of resignation as a matter of law.

Judge Eldon then requested plaintiff's attorney to state the additional evidence plaintiff intended to introduce. Plaintiff's attorney then stated that Mr. Cheeseman would testify to the following additional facts:

It was Local 165's policy that a resignation is effective only when received in writing at the business office of Local 165, which is located at 201 N.

Wells Street, Room 1730, Chicago, Illinois. The reason for this policy is that due to the large number of members in Local 165, and the fact that they are dispersed all over Cook County, Local 165 required all matters involving membership to be communicated to the business office of Local 165, where all membership records are maintained. This policy was necessary in order to allow Local 165 to keep track of its membership.

Judge Eldon inquired whether there was an official, written procedure within Local 165 for resigning from membership. Mr. Keenan replied that there was no written procedure.

Mr. Ryan held no official position, either elected or appointed, with Local 165 during the August 1983 strike. As a member of Local 165, Mr. Ryan had no authority to act on behalf of Local 165 in matters involving membership in Local 165.

Under the IBEW Constitution and Bylaws, which would have been introduced into evidence and are attached hereto as Exhibit No. 1 and Exhibit No. 2, respectively, only the elected officers of the IBEW and Local 165 have authority to act on behalf of Local 165 in matters involving union membership.

Mr. Cheeseman would have further testified that under the IBEW Constitution and Local 165 Bylaws, a union steward likewise has no authority to act on behalf of Local 165 in matters of union membership. Under the IBEW Constitution and Local 165 Bylaws, a union steward is not an officer of Local 165. Under Article VIII of the Bylaws, stewards are appointed by the Business Manager when needed. A steward's duties under Article VIII are purely ministerial in nature.

Mr. Cheeseman would have stated that no one at the business office of Local

165, including the officers of Local 165, received any notice from anyone during the strike that Steve O'Donnell had attempted to resign from Local 165 by giving his union card to Mr. Ryan. Mr. Cheeseman would have further testified that at the time of the trial, the membership records for Local 165 list Mr. O'Donnell as a "member" of Local 165. The records further reflect that Mr. O'Donnell was considered a member "not in good standing" on account of the fact that Mr. O'Donnell had violated the IBEW Constitution by working for Illinois Bell during the strike.

Judge Eldon then stated that even in view of the above evidence, he was nevertheless inclined to find that Mr. O'Donnell had effectively resigned from Local 165 by giving his union card to Mr. Ryan, who was a former union steward.

Plaintiff's attorney then produced

copies of the decisions in the following cases of: In re: Arbitration American Car and Funding Co., 11 LRRM 2582 (1942); Arbitration Bendix Aviation Corp., 11 LRRM (1944); and South Central Counties District Council vs Smith, 61 LRRM 2208 (Calif. Mun. Ct. 1966). Plaintiff's attorney cited these cases for the propositions that (i) an oral resignation must be made to an officer of the union in order to be legally effective, and (ii) that a union steward is not considered a union officer. Plaintiff's attorney then argued that the act of Mr. O'Donnell giving his union card to Mr. Ryan, who was not even a steward of Local 165, was legally ineffective notice to Local 165 of his attempt to resign.

Judge Eldon found plaintiff's arguments unpersuasive and held that Mr. O'Donnell had effectively resigned from Local 165 by giving his union card to Mr.

Ryan, a former steward of Local 165. Judge Eldon then entered an order dismissing plaintiff's complaint with prejudice.

29 U.S.C. § 157. Rights of employees. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 158(a) (3) Unfair labor practices.

It shall be an unfair labor practice for an employer-- by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in

the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discriminatio against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the

periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership....

28 U.S.C. § 158(b) (1) (A). Unfair labor practices.

It shall be an unfair labor practice for a labor organization or its agents -- to restrain or coerce employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein....

U.S. CONST. amend. XIV, Section 1.

...No State shall deprive any person of life, liberty, or property, without due process of law....